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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

**-oOo-**

United States of America,	)	
	)	Case No. 2:16-cr-100-GMN-CWH
Plaintiff,	)	
	)	<b>Government's Motion to Unseal</b>
vs.	)	<b>Transcripts for Appeal</b>
	)	<b>(expedited treatment requested)</b>
Jan Rouven Fuechtener,	)	
	)	
Defendant.	)	
	)	

The United States files this urgent motion requesting this Court enter an order unsealing a portion of a transcript from a hearing held before Magistrate Judge Hoffman on October 2, 2018. ECF No. 373 (sealed portion). The order is sought for the following reasons:

**FACTUAL BACKGROUND**

This Court sentenced Fuechtener to 240 months' custody. ECF No. 345. Notwithstanding the appellate waiver in his plea agreement, Fuechtener appealed. ECF No. 346. Among other claims, Fuechtener asserts in his opening brief that he was deprived of his constitutional right to counsel during the motion hearing on October 9, 2018 to release funds to the law firm of Chesnoff and Schonfeld. Fuechtener further maintains that this

1 Court's question of whether he wanted to proceed with Mr. Schonfeld for the purposes of  
2 the motion to release funds, but without Ms. Connolly present, was coercive.

3 Fuechtener elides from his opening brief and his excerpts of record the transcript of a  
4 hearing before Magistrate Judge Hoffman held on October 2, 2018. During a portion of that  
5 hearing, the government was excused from the courtroom. ECF No. 4. Later, when the  
6 government was invited back to the courtroom, Judge Hoffman commented that the  
7 discussions with Ms. Connolly and Mr. Schonfeld during the sealed portion were about  
8 dual representation. Specifically, Judge Hoffman commented that " the fact that there are  
9 two lawyers working on this case may have an impact on the way the government views  
10 how this case is being . . . defended." *Id.* at 5. Recognizing the nature of Fuechtener's  
11 request for funds, the defense strategy, and that the dual representation was necessary for  
12 Fuechtener to accomplish his goals, Judge Hoffman explained that Schonfeld was appearing  
13 for Fuechtener "as special counsel for the special specific purpose of getting [the] funds  
14 released," as part of the defense strategy overall. *Id.* at 7.

### 15 DISCUSSION

16 After an appeal has been filed, district courts have inherent discretionary power to  
17 seal or unseal items filed in cases before them. *See United States v. Shryock*, 342 F.3d 948, 983  
18 (9th Cir. 2003); Fed. R. Civ. P. 5.2(d) (court may order sealing and unsealing); *Dressler v.*  
19 *Seeley Co. (In re Silberkraus)*, 336 F.3d 864, 869 (9th Cir. 2003) (after appeal filed, district  
20 court may continue to take "action [that] aids [appellate] review"). "Enabling all parties to  
21 respond adequately to arguments on appeal by managing the record aids appellate review."  
22 *United States v. Seugasala*, No. 16-30132, 670 F. App'x 641 (9th Cir. Nov. 17, 2016) (district  
23 court has inherent authority to unseal records concerning ex parte request to remove  
24 counsel).

1 The law is unconcerned with generic labels of “general” versus “special”  
2 representation in the constitutional context. The question is whether Fuechtener had  
3 counsel during all critical stages of the proceedings. *United States v. Cronin*, 466 U.S. 648  
4 (1984). Knowing the full scope of the conversation and the representation is fundamental to  
5 the government’s response on appeal. The government’s need to fully develop the record on  
6 appeal and adequately respond to Fuechtener’s claim constitutes a compelling interest  
7 because, without understanding the context for the Court’s comments about the scope of  
8 representation, the government will be unable to make an informed decision about how best  
9 to respond to Fuechtener’s claim. When balancing this compelling interest against the then-  
10 existing interest in preserving the attorney-client privilege by sealing the transcripts, the  
11 Court should conclude that, because case has concluded and the former-counsel  
12 relationships have ended, the government’s strong interest in being able to adequately  
13 advocate to preserve Fuechtener’s conviction on appeal outweighs any remaining privilege  
14 issue. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (district  
15 court must balance competing interests).

16 Government counsel emailed Fuechtener’s appellate counsel to meet and confer on  
17 his position regarding the government’s request. Appellate counsel indicated that because  
18 the request involves the waiver of privilege, he would need Fuechtener’s permission.

19 But, in making his argument, Fuechtener has waived any attorney-client privilege. A  
20 person waives the attorney-client privilege if: “the waiver is intentional; (2) the disclosed  
21 and undisclosed communications or information concern the same subject matter; and (3)  
22 they ought in fairness to be considered together.” Fed. R. Evid. 502(a).

23 Even when a party does not explicitly disclose the content of an attorney-  
24 client communication, he may waive the privilege implicitly. . . . As we  
have said, “The privilege which protects attorney-client communications

1 may not be used both as a sword and a shield. Where a party raises a  
2 claim which in fairness requires disclosure of the protected  
communication, the privilege may be implicitly waived.”

3 *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997), cert. denied, 522 U.S. 851,  
4 118 S.Ct. 141 (1997) (citations omitted); *see also Bittaker v. Woodford*, 331 F.3d 715,  
5 716 (9th Cir. 2003); *Wharton v. Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997).

6 Fuechtener has placed in issue the conversations with his attorneys and Judge  
7 Hoffman regarding the scope of the representation. By challenging the assistance of  
8 counsel in his opening brief, he has implicitly waived his attorney-client privilege as  
9 to the facts, circumstances, and conversations relating to the scope of the  
10 representation. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.  
11 1992) (implicit waiver where fairness requires disclosure).

12 The government respectfully requests that, to the extent necessary, this Court  
13 deems that Fuechtener has waived his attorney-client privilege as related to issues he  
14 raised on appeal, and that this Court unseal the transcripts contained at ECF 373 and  
15 direct the Clerk of the Court to provide a copy to the government. Given the current  
16 deadline for the government’s answering brief, the government seeks expedited  
17 briefing and review.

18 DATED this 29th day of January, 2020

19 Respectfully submitted,

20 NICHOLAS A. TRUTANICH  
21 United States Attorney

22 //s//

23 ELHAM ROOHANI  
24 Assistant United States Attorney

**CERTIFICATE OF ELECTRONIC SERVICE**

This is to certify that the undersigned has served counsel for Defendant with the foregoing by means of email.

January 29, 2020

                    //s//                      
ELHAM ROOHANI  
Assistant United States Attorney